SEP 2 2001

No. 00-1776

In The

Supreme Court of the United States

JIMMY L. DUNCAN,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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This Petition presents two major and interrelated questions regarding the Americans With Disabilities Act: (1) What constitutes a substantial limitation in the major life activity of working?; (2) What type of evidence must be adduced to support such a claim? As will be explained below, this Court granted certiorari in a case presenting similar issues, Toyota Mfg., Ky., Inc. v. Williams, Petn. No. 00-1089 (cert. granted, April 16, 2001). Since the decision in Williams may well decide the outcome of this case, this court should at a minimum hold the Petition for Certiorari in this case pending the decision in Williams. Nonetheless, there is a substantial split in the circuits which warrants granting of this petition. The decision below conflicts with at least six federal circuit courts of appeal. Respondent either failed to address or downplayed without actually distinguishing the six circuit court decisions that conflict with the decision below.

I. WILLIAMS MAY WELL DECIDE THE OUTCOME OF THIS CASE

Respondent asserts that the outcome in Toyota Motor Mfg., Ky., Inc. v. Williams, No. 00-1089, cert. granted, (April 16, 2001) "is immaterial to further disposition of this case." Brief in Opposition ("Opp.") 2. Said assertion is wrong.

The Petitioner in Williams (hereinafter "Toyota") principally argues that the Sixth Circuit erred by finding a disability solely based upon Williams' "inability to 'perform the manual tasks that are job related" because "the court below circumvented the established rule that a disability must amount to more than an inability to do a specific job." In so holding, Toyota further argues that the Sixth Circuit "circumvented" or "conflated" the standard expressed by the EEOC and in all case law that "the inability to perform one

job is not sufficient to prove one is substantially limited in the major life activity of working. (Williams, Pet. Brief at 10, 19 other citations omitted) Toyota argues that the Sixth Circuit "made an end run" and "collapses the distinction" between proving one is substantially limited in the major life activity of manual tasks versus working. Id.

Further, several amici have addressed the issue of what standard of proof is required to show a substantial limitation in the major life activity of working. One amicus contends that the ADA protects only those who "without statutory protection, might be largely if not entirely foreclosed from the job market." (Brief of Amicus Curiae, the American Trucking Associations, Inc., et. al., p.15). Another suggests that a plaintiff such as Williams must show that her impairment "all but precluded the employee from using the employee's hands and the employee... was unable to find work in a field for which the employee had necessary training or skills."(Brief of Amicus Curiae Levi Strauss & Co., pp.27-28)

The Plaintiff, Williams, on the other hand, argues strongly that the term "disability" cannot be interpreted in such a severe manner because it would only allow those whose restrictions are so severe as to prevent them from working entirely to be considered "disabled." This would thwart the operative provision of the ADA. Williams, Respondent Brief at 29,31.

Williams also argues, as we do, that the operative test for courts to find a substantial limitation in working is "whether the particular impairment constitutes for the particular person a significant barrier to employment." Williams Respondent Brief at 38-39, 43 citing Forrisi v. Bower, 794 F.2d 931 (4th Cir. 1986). Williams urges this

Court to examine Williams' limited educational background and work experience when making the determination of whether Williams is substantially limited in working under this test. Petitioner herein has argued that his evidence was sufficient under such a test and that this test should be followed. Pet. 21.

Finally Williams argues she was precluded from a class of jobs since she was precluded from all jobs requiring repetitive manual activity and jobs requiring frequent lifting more than 10 pounds. Thus she argues she was substantially limited in the major life activity of working. Williams Respondent Brief at 43. The facts presented by Petitioner herein are extremely similar – that he was precluded from all jobs requiring frequent lifting over 20 pounds, which was the only type of job he had performed his entire life, for the most part. If this Court finds there were disputed facts as to whether Williams was substantially limited in the major life activity of working, then the jury verdict must be reinstated in the present case because of the similarity of facts.

Accordingly, it is clear that this Court in Williams may well decide the interrelationship between being substantially limited in the major life activity of manual tasks and being substantially limited in the major life activity of working. Therefore, this Court in Williams may well have to decide if there are different standards and proof requirements to prove one is disabled by showing a substantial limitation in the major life activity of manual tasks versus working. Further, this Court may well decide in Williams if one can prove substantial limitation in working by proving one's impairment creates a "significant barrier to employment" by examining individualized characteristics such as limited education and vocational background. If this Court has to clearly enunciate the proof requirements to

show a substantial limitation in working under the ADA, Williams will likely decide the outcome of the instant case. Therefore, at a minimum, this petition should be held pending the outcome in Williams.

II. THE DECISION BELOW CONFLICTS WITH SIX OTHER CIRCUITS

Respondent is wrong to suggest that the sharp conflict between the decision below and those of other circuits is not a "true conflict" and that "there is no split in the Circuits." See Opp. 1, 12-16. As noted in the Petition, each and every one of the six Circuit decisions cited by Petitioner focuses on whether one's physical impairment precludes one from a class of jobs or broad range of jobs, not on the numbers and types of jobs "available" to the Plaintiff, the standard set by the D.C. Circuit. See Pet. 13-23. Respondent ignores this important split between the six Circuit decisions and the decision below. Respondent either admitted that a decision conflicted, failed to address at all or downplayed without distinguishing the six circuit decisions that are in conflict with the decision below.

First, Respondent has admitted that the en banc D.C. Circuit "did recognize that it's decision was contrary" to the Ninth Circuit in Wellington v. Lyon County School Dist., 187 F.3d 1150 (9th Cir. 1999), Opp. 14. Respondent attempts to downplay this conflict by contending that Wellington "did not address Sutton," whereas another Ninth Circuit decision, Broussard v. Univ. of California, 192 F.3d 1252 (9th Cir. 1999) did address Sutton. Id. The fact that Wellington did not mention Sutton and Broussard did mention Sutton is irrelevant because Sutton does not address the questions presented in this case. Further, the decision below is inconsistent with and misinterprets Sutton. (Petn. at 24-29).

Most importantly, the Ninth Circuit did not state Broussard overruled Wellington. Finally, Broussard is factually distinguishable and inapplicable. Broussard failed to present any medical evidence that she was precluded from a class of jobs or had any specific lifting restrictions, contrary to Duncan's evidence herein. Therefore, the court examined her vocational evidence and found it deficient.[1]

Respondent also downplays the great conflict between the decision below and Quint v. A.E. Staley Mfg. Co., 172 F.3d 1 (1st Cir. 1999). Respondent suggests that the evidence in Quint from a medical doctor that Quint was "precluded from a lot of jobs" that existed in her state because she was precluded from all physical labor jobs was somehow different than that presented herein and would have met the D.C. Circuit standard. This is not true at all. The D.C. Circuit standard required a showing of the number of jobs that were available to Petitioner with his impairment. No such showing was made by Quint as to either the jobs available to her based upon her impairment or the number and types of jobs she was precluded from because of her impairment. The medical doctor's very non-specific testimony is an obvious fact that exists in any major

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[1] Respondent's reliance on another Ninth Circuit opinion, Thompson v. Holy Family Hospital, 121 F.3d 537 (9th Cir. 1997) (per curiam) is entirely suspect as this case is readily distinguishable. The Thompson court only discussed the plaintiff's failure to submit statistical evidence of the number and types of jobs she was precluded from because the defense had proffered an affidavit from a vocational counselor that the plaintiff, a nurse, was still qualified for a number of registered nurse positions. Id. at 540. No such evidence was submitted by WMATA at trial in the instant case.

metropolitan area or any state in the union; a jury does not need to be told it. Said evidence in Quint added nothing to the quantum of evidence in front of the jury and does not make this case any different than Quint. Quint is in direct conflict with the decision below as it is almost factually identical but reached an entirely different result.

Respondent admits that no courts, including the Eleventh Circuit in Mullins v. Crowell, 228 F.2d 1305, 1327, n. 18 (11th Cir. 2000) have held that expert vocational statistical evidence is a "per se" requirement to show a substantial limitation in working. Opp. 14. Again, Respondent attempts to downplay the split between Mullins and the instant case by arguing that the Court in Mullins noted the Plaintiff could satisfy his evidentiary burden without expert testimony "by testifying about his own extensive job search." Id. However, Petitioner did testify about his extensive job search because he testified he was on unemployment for nine months before settling for a minimum wage part-time job earning one third of his pre-termination salary. Clearly, the jury could infer Petitioner applied for countless jobs to be eligible for unemployment benefits as this is a mandatory requirement within the common knowledge of the jury. Thus Petitioner's evidence was not materially different from Mullins.

In addition to downplaying the conflict between the decision below and the First, Ninth and Eleventh Circuits, Respondent did not even mention the Fourth Circuit decision of Cline v. Wal-Mart Stores, Inc., 144 F.3d 294,303 (4th Cir. 1998) which is in direct conflict with the decision below. See Pet. 17-18. Also Respondent barely mentions the Second Circuit opinion in Bartlett v. NY State Board of Law

Examiners, 226 F.3d 69 (2d Cir. 2000).[2] Bartlett again is in direct conflict with the decision below because no evidence was presented as to what jobs were either "available" to Bartlett with her impairment or to what jobs she was "precluded" from because of her impairment. Pet. 17. The Second Circuit held she was precluded from "countless jobs" practicing law because of her impairment as a result of "common knowledge" and found this to be enough evidence to create a fact question on the issue of disability

Next Respondent asserts that Burns v. Coca-Cola Enter., Inc., 222 F.3d 247 (6th Cir. 2000) is not in conflict with the court below because of the fact that the District

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[2] Respondent's citation of another Second Circuit decision, Colwell v. Suffolk County Policy Dept., 158 F.3d 635 (2d Cir. 1998), cert denied, 119 S.Ct. 1253 (1999), is of no moment because the facts have no applicability to the present case. Colwell involved several police officers who claimed that they were "disabled" under the ADA because they had back or neck impairments that substantially limited them in the major life activity of working The Second Circuit found that these officers were still working in light duty jobs in the police department and presented no evidence at all they were precluded from any particular class of jobs. Id at 645. Since the officers had done light duty work in the law enforcement area, their ability to work was not substantially limited in the field they were in. Id. This is directly opposite from Petitioner whose impairment precluded him from heavy labor jobs, a class of jobs, in which he had almost exclusively worked before and he was unable to work in any longer.

Court relied upon an uncited [3] affidavit from a vocational expert that Burns was precluded from at least 50% of the jobs he was qualified from. First, Respondent misses the point entirely because again the Sixth Circuit examined whether the Plaintiff's impairment precluded him from a significant percentage of jobs in the class for which he was qualified (i.e. heavy labor jobs), not what jobs were available to him as a result of the impairment. Accordingly, Burns is in direct conflict with the decision below. Further, Burns is in conflict with the decision below as to the quantum of proof necessary to survive a summary judgment motion. This is so because Petitioner argued, based upon his prior work experience (i.e. almost exclusively limited to jobs requiring heavy lifting), his medical impairment and limited educational background, that he was disqualified from 100% of the jobs that he had transferable skills to perform Duncan's evidence is no different than Burns' evidence.

Finally, Respondent asserts that the Third, Fifth, and Tenth Circuits support the lower court decision. Opp.12-13. We believe Respondent has totally misread these cases as they are all factually distinguishable. Nonetheless even if these cases are consistent with the holding of the D.C.

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[3] This affidavit was not referenced at all in the Circuit Court opinion nor was it referenced by the D.C. Circuit which stated that the District Court's finding in Burns "was apparently based solely on a 23-pound lifting limit and limited education and work experience." (emphasis added) App.35a. Accordingly, the D.C. Circuit believed that Burns was in conflict with Duncan's evidence herein because Duncan presented almost identical medical evidence as to his lifting restriction and his limited educational background and work experience.

Circuit as Respondent asserts, Respondent's citation of these cases show how widespread a conflict there is among the circuits with six circuits in conflict with the decision below, three circuits allegedly consistent with the decision below and the Seventh Circuit having conflicting decisions. Pet.19-21.

Accordingly, because of the split between and among the Circuits, Petitioner requests that the Petition be granted to settle the questions of law presented herein.

III. RESPONDENT HAS WAIVED ITS RIGHT TO CONTEST THE JURISDICTION OF THIS COURT

Respondent asserts for the first time in this litigation after more than six years, that federal courts lack jurisdiction over claims against WMATA brought under the ADA. Petitioner will not discuss the merits of the Respondent's position because the Respondent has clearly waived the right to argue this position. It has failed to raise said issue for six years and it submitted to the jurisdiction of the Federal Courts through a trial and lengthy appellate process. Numerous Federal Circuit Courts of Appeal have held that such a failure to raise the Eleventh Amendment as a defense constitutes a waiver of said right when raised at a late date. Hill v. Blind Industries and Services of Maryland, 179 F.3d 754,758 (9th Cir. 1999) (other citations omitted)

This issue on the merits has never been briefed and this Court should not deny a Petition for A Writ of Certiorari when such an issue clearly has been waived and never addressed by the lower courts. At a minimum, this is an issue for remand once the other issues in this case are decided by the Supreme Court.

IV. RESPONDENT FAILED TO PROPERLY RAISE THE ISSUE OF WHETHER WORKING IS A MAJOR LIFE ACTIVITY

Finally, Respondent argues that this Court should deny certiorari because "working is not a major life activity." Opp. 20-22. This issue has also been raised by an amicus brief in Williams (Brief of Amicus Curiae, the American Trucking Associations, Inc., et. al. p. 15). However, this issue was never properly raised as it was first raised by Respondent in a Supplemental Brief in the en banc proceedings below. Such an argument was never raised in the District Court or in all briefs in the initial stages of the appeal. In fact, Judge Henderson in the initial panel decision of the court below noted:

> The parties to this appeal agree that Duncan's degenerative disc disease was a physical impairment and that 'working is the activity involved and that it is a major life activity under the ADA.' See, e.g., Brief of Appellant at 16, Brief of Appellee at 15-19). App 5a. (Emphasis added)

The Court below did not decide this issue but only commented on the issue in a concurring opinion. Thus it is improper to raise such an issue when it was never decided or properly raised below. See Singleton v. Wulff, 428 U.S. 106, 120 (1976); Accord, Swanks v. WMATA, 179 F.3d 929,936 citing Chedick v. Nash, 151 F.3d 1077, 1084 (D.C. Cir. 1998)

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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